U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS AAO, 20 Mass, 3/F
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Washington, DC 20536

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PUBLIC COPY

File: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 22 2004

EAC 01 256 53798

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion top reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. Section 203(b)(3)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(C), requires a labor certification (Form ETA 750) before an immigrant visa may be issued for classification that the petitioner claims, under § 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). An exemplar of Form ETA 750 reflects a priority date of February 9, 2001 and a proffered wage of $11.47 per hour or $23,857.60 per year.

In a request for evidence dated November 2, 2001 (RFE), the director requested the original Form ETA 750 and additional evidence of the ability to pay, such as wage and tax statements

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(Forms W-2) for wages paid to the beneficiary. The RFE required a showing of the ability to pay the proffered wage from the priority date and continuing to the present.

In response, the beneficiary authorized a G-639 and G-28 about October 1, 2001, and counsel requested a review and copy of the record from Citizenship and Immigration Services [CIS], formerly the Service, the INS, or the Associate Commissioner.

In a decision dated June 4, 2002 (D1), the director determined that taxable income of $6,958 in 2000 did not reasonably support the ability to pay the proffered wage at the priority date. The director noted that the beneficiary has no standing to initiate a G-639 or a G-28. *See* 8 C.F.R. § 103.2(a)(3). Stating that the record showed no explanation to establish why the original Form ETA 750 was not available, the director denied the petition in D1.

The petitioner appealed on July 8, 2002. The director rejected the appeal as untimely in a decision on August 21, 2002 (D2). In a decision dated September 15, 2003 (D3), the director conceded that the appeal was timely and vacated D2, proposed to refund the fee for a second appeal, restored the first appeal, and sent it directly to the AAO.

The petitioner urges, on appeal, that the 2001 Form 1120, U.S. Corporation Income Tax Return, shows salaries paid to others of $150,840. Also, gross receipts increased to $385,818 in 2001. Counsel complains of the use of taxable income as a test of the petitioner's ability to pay the proffered wage.

Contrary to counsel's contention, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash

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the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

The petitioner's federal tax return for 2001 reported taxable income before net operating loss deduction and special deductions of ($2,198), a loss, and less than the proffered wage. Schedule L reported current assets of $9,156 minus current liabilities of $16,246, or a deficit, ($7,090), of net current assets, less than the proffered wage.

The petitioner emphasizes that, in 2001, it paid the beneficiary $7,600 for part-time work. With the taxable loss of ($2,198), funds available were $5,402, less than the proffered wage.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Seng T. Soon, speaking for the petitioner, states as to 2001 that:

> I paid myself, my wife [LL], and my brother [STS] a total of $99,160 part of which I intend to pay [the beneficiary] as I increase his hours and reduce my family's hours….

The petitioner advises that the beneficiary will replace hours of three (3) family members and that they are earning $99,160, or, respectively, $55,000, $22,000, and $22,040. The record does not, however, verify their full-time employment or provide evidence that the beneficiary would replace them. Moreover, there is no evidence that the owners' and a brother's positions, as chefs, involve the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Simply going on record without supporting documentary evidence is

not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

A petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

After a review of the federal tax returns and the shareholder's representations, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The lack of the original Form ETA 750 appears to be moot, since 8 C.F.R. § 103.1 (f)(3)(iii) withholds jurisdiction from the AAO and states:

> *Appellate Authorities.* In addition, [CIS] exercises appellate jurisdiction over decisions on …
>
> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under §§204.5 and 204.6 of this chapter except when the denial is based upon lack of a certification by the Secretary of Labor under section … 212(a)(5)(A) of the Act…."

There is no appeal available when a decision is based on a lack of labor certification. This appeal must be rejected in respect to the absence of the original Form ETA 750, since AAO has no jurisdiction over its lack.

ORDER: The appeal is dismissed.